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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 10, Original

UNITED STATES OF AMERICA
Plaintiff,

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA and FLORIDA,
Defendants.

SUPPLEMENTAL MEMORANDUM OF ADDITIONAL RESEARCH CONCERNING UNITED STATES RECOGNITION OF TEXAS' THREE LEAGUE BOUNDARY, AND MOTION FOR LEAVE TO FILE

WILL WILSON
Attorney General of Texas
JAMES N. LUDLUM
First Assistant Attorney General
HOUGHTON BROWNLEE, JR.
JAMES H. ROGERS
JOHN FLOWERS
Assistant Attorneys General
Capitol Station
Austin, Texas

Of Counsel:
PRICE DANIEL
Governor of Texas
Austin, Texas
JAMES P. HART
Brown Building
Austin, Texas
J. CHRYS DOUGHERTY
ROBERT J. HEARON, JR.
Capital National Bank Building
Austin, Texas

October 12, 1959

Baldwin Printing Company, Inc., 209 West Eighth Street, Austin

IN THE

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STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA and FLORIDA,
Defendants.

MOTION FOR LEAVE TO FILE MEMORANDUM OF ADDITIONAL RESEARCH CONCERNING UNITED STATES RECOGNITION OF TEXAS' THREE LEAGUE BOUNDARY

The State of Texas desires to present to the Court the attached supplemental memorandum of historical material discovered on the eve of oral argument and moves for leave to file the same.

Respectfully submitted,

WILL WILSON
Attorney General of Texas
JAMES N. LUDLUM
First Assistant Attorney General
HOUGHTON BROWNLEE, JR.
JAMES H. ROGERS
JOHN FLOWERS
Assistant Attorneys General
Capitol Station
Austin, Texas

Of Counsel:
PRICE DANIEL
Governor of Texas
Austin, Texas
JAMES P. HART
Brown Building
Austin, Texas
J. CHRYS DOUGHERTY
ROBERT J. HEARON, JR.
Capital National Bank Building
Austin, Texas

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SUPPLEMENTAL MEMORANDUM OF ADDITIONAL RESEARCH CONCERNING UNITED STATES RECOGNITION OF TEXAS' THREE LEAGUE BOUNDARY

The most solemn act of foreign policy of any nation is its declaration of war.

In his message of May 11, 1846, calling upon the Congress to declare war against Mexico, President Polk said in part:

> ". . . On the 10th of November, 1845, Mr. John Slidell, of Louisiana, was commissioned by me as envoy extraordinary and minister plenipotentiary of the United States to Mexico, and was entrusted with full powers to adjust both the questions of the Texas boundary and of indemnification to our citizens. The redress of the wrongs of our citizens naturally and inseparably blended itself with the question of boundary. The settlement of the one question,

in any correct view of the subject, involves that of the other. I could not, for a moment, entertain the idea that the claims of our much injured and long suffering citizens, many of which had existed for more than twenty years, should be postponed or separated from the settlement of the boundary question. . . .

"Meantime Texas, by the final action of our Congress, had become an integral part of our Union. The Congress of Texas, by its act of December 19, 1836, had declared the Rio del Norte to be the boundary of that republic. Its jurisdiction had been extended and exercised beyond the Nueces. The country between that river and the Del Norte had been represented in the congress and in the convention of Texas; had thus taken part in the act of annexation itself; and is now included within one of our congressional districts. Our own Congress had, moreover, with great unanimity, by the act approved December 31, 1845, recognized the country beyond the Nueces as a part of our territory, by including it within our own revenue system; and a revenue officer, to reside within that district, has been appointed, by and with the advice and consent of the Senate. It became, therefore, of urgent necessity to provide for the defense of that portion of our country. Accordingly, on the 13th of January last, instructions were issued to the general in command of these troops to occupy the left bank of the Del Norte. . . . Had we acted with vigor in repelling the insults and redressing the injuries inflicted by Mexico at the commencement, we should doubtless have escaped all the difficulties in which we are now involved.

"Instead of this, however, we have been exerting our best efforts to propitiate her good

will. Upon the pretext that Texas, a nation as independent as herself, thought proper to unite its destinies with our own, she has affected to believe that we have severed her rightful territory, and in official proclamations and manifestoes has repeatedly threatened to make war upon us, for the purpose of reconquering Texas. In the meantime, we have tried every effort at reconciliation. The cup of forbearance had been exhausted, even before the recent information from the frontier of the Del Norte; but now, after reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory, and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war. . . .

"In further vindication of our rights, and defence of our territory, I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace. . . ." House Ex. Doc. 60, 30th Cong. 1st Sess. 4-10, Serial 520.

After the war Nicolas Trist (who since 1845 had been Chief Clerk of the Department of State) was sent as Peace Commissioner to Mexico with instructions from Secretary Buchanan, dated April 15, 1847, directing him to deliver to the Mexican Commissioners a draft of a proposed peace treaty, Article IV of which began:

"The boundary line between the two republics shall commence in the Gulf of Mexico, three

> leagues from land opposite the mouth of the Rio Grande; from thence up the middle of that river . . . House Ex. Doc. 69, 30th Cong., 1st Sess. at 43, 48, Serial 521.

Later, on July 19, 1847, Secretary Buchanan wrote Trist again directing him to use that same three-league beginning point but with a modification in the western part of the boundary so as to make it follow the 32nd parallel of latitude. *Id.* at 53.

As we have already pointed out (Texas Br. 102), Trist said that he was instructed to "agree that the line shall be established along the boundary defined by the Act of Congress of Texas, approved December 19, 1836. . . .' Papers of Nicolas P. Trist, Vol. 33, Miscellaneous, Library of Congress, 1917, p. 62071.

That both the Executive and the Congress clearly understood that Texas came into the Union with its boundary intact as set forth in the Act of December 19, 1836, is evident from President Polk's Message to Congress on December 7, 1847. He said:

> "The terms of a treaty proposed by the Mexican commissioners were wholly inadmissible. They negotiated as if Mexico were the victorious, and not the vanquished party. They must have known that their ultimatum could never be accepted. It required the United States to dismember Texas, by surrendering to Mexico that part of the territory of that State lying between the Nueces and the Rio Grande, included within her limits by her laws when she was an independent republic, and when she was annexed to the United States and admitted by

Congress as one of the States of our Union. . . ." House Ex. Doc. 8, 30th Cong., 1st Sess. 9, Serial 515.

In the light of these documents there can be no doubt that the United States, as a deliberate act of foreign policy, admitted Texas with full knowledge and recognition of her three-league boundary in the Gulf of Mexico. It waged war to protect a part of the boundary declared in that boundary act. There is no room for the implication of any limitation on that boundary drawn from what the State Department may have written in other situations before or since Texas' annexation and this national approval of her boundary immediately thereafter.

Respectfully submitted,

WILL WILSON
Attorney General of Texas
JAMES N. LUDLUM
First Assistant Attorney General
HOUGHTON BROWNLEE, JR.
JAMES H. ROGERS
JOHN FLOWERS
Assistant Attorneys General
Capitol Station
Austin, Texas

Of Counsel:
PRICE DANIEL
Governor of Texas
Austin, Texas
JAMES P. HART
Brown Building
Austin, Texas
J. CHRYS DOUGHERTY
ROBERT J. HEARON, JR.
Capital National Bank Building
Austin, Texas

October 12, 1959

I certify that I have served copies of the foregoing motion and the attached memorandum by delivering them to the offices of the Attorney General and the Solicitor General of the United States, Washington, D. C., this the____ day of October, 1959.

_____

Will Wilson

JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1959

No. 10, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA and FLORIDA,
Defendants.

SUPPLEMENTAL BRIEF OF THE STATE OF MISSISSIPPI IN OPPOSITION TO MOTION FOR JUDGMENT ON AMENDED COMPLAINT.

JOE T. PATTERSON
Attorney General of Mississippi
New Capitol Building
Jackson, Mississippi

JOHN H. PRICE, JR.
Assistant Attorney General
New Capitol Building
Jackson, Mississippi

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SUPPLEMENTAL BRIEF OF THE STATE OF MISSISSIPPI IN OPPOSITION TO MOTION FOR JUDGMENT ON AMENDED COMPLAINT.

Pursuant to the permission granted by this Court to the parties hereto at the conclusion of the oral arguments herein on October 15, 1959, we submit this supplemental brief with the hope that it may lend clarity to the position of the State of Mississippi in the light of the oral arguments of counsel for the United States and the questions propounded by the Court during the arguments.

I

Mississippi's boundary description as set out in its Enabling Act of March 1, 1817, which was included in the Mississippi Constitution of 1817, and which was included by reference in the Act of Admission of December 10, 1817, established a seaward boundary for said State six leagues from shore in the Gulf of Mexico.

By his Proclamation of 1682 under which he claimed Louisiana for France by discovery, LaSalle claimed

the area south of the Mississippi River including "the seas, harbours, ports, bays and adjacent straits." *The Louisiana Purchase* 4 (Washington, 1955). Thus it would appear that LaSalle was familiar with the nature of the islands lying off the shore.

In 1699, Iberville settled at the site of the present City of Biloxi, Mississippi, and on Dauphin Island, one of the sand islands presently lying off the shore of Alabama, where he remained for 23 years before relocating on the banks of the Mississippi River. He, also, must have been intimately familiar with the location and the nature of the islands lying off the shore.

Likewise, King George III of Great Britain must have known the nature of these islands, which were described by this Court in *Louisiana v. Mississippi*, 202 U. S. 1, 46, as "sea-sand islands," when he proclaimed a boundary six leagues into the Gulf of Mexico by defining the southern boundary of West Florida (which included the area which is now the southern portions of Mississippi and Alabama) as "bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast." *American State Papers*, 5 Public Lands 308.

We have not been able to determine, and we do not believe it can be accurately determined at this time, the exact location of all of the islands which lay off the shore of the State of Mississippi, or off the shore of any of the Gulf Coast States for that matter, at the time King George proclaimed the six league gulfward boundary aforesaid in 1763. Nor have we been able to establish, nor do we believe that it can be established, the exact location of the islands lying off the shore of

Mississippi at the time said State was admitted into the Union.

We believe that it is reasonable to assume that there were islands on or approximately on the six league seaward boundary line, and that this was the reason King George established said boundary at that distance. But even if there were no islands on said perimeter boundary, at least we must assume that King George knew the character of these sand islands — that they shifted and moved from time to time, and that some disappeared and some reappeared — and that he also knew that the shore lines of the islands were constantly changing as a result of the winds and the washing action of the waves and tides. Also, it must be assumed that he was aware of the shoalness of the waters which prohibited the approach of ships closer than several miles from the mainland in most places. He must have concluded that islands were likely to appear at almost any place within the six league perimeter boundary.

These assumptions attributing such knowledge to these figures in history are only assumptions of course, but we believe them to be reasonable assumptions to which the physical facts have borne testimony in past years and to which they continue to bear witness even to the present day.

The Congress, in establishing Mississippi's boundary in the Gulf of Mexico in the Enabling Act of March 1, 1817, 3 Stat. 348, by the use of the language "thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne, . . ." apparently intended to claim as a part of the State of Mississippi everything in the Gulf of Mexico that King George III had claimed by his said

proclamation and which had been likewise claimed by each succeeding owner in the chain of title from 1763 until the United States claimed title to this area under the Louisiana Purchase. 8 Stat. 200.

Needless to say, at the time of the passage and approval of Mississippi's Enabling Act and the Act admitting Mississippi into the Union, 3 Stat. 472, the United States was as familiar with the changeable nature of the islands lying off her southern shore as were her predecessors in the chain of title.

II

"Territorial sea" should not be confused with property rights under the sea, and the argument of plaintiff that the seaward boundaries "as they existed at the time" each Gulf Coast State became a member of the Union were automatically withdrawn to three miles from the coast line is untenable.

The brief of the United States and the oral argument of Government counsel seem to confuse "territorial sea" with property rights in the subsoil and seabed under the Gulf of Mexico. We make no claim to title to any part of the territorial sea. We readily concede that under the Submerged Lands Act, 67 Stat. 29, the United States expressly retained exclusive jurisdiction over the territorial sea for the purposes of navigation, flood control, the production of power, and the like. But just as surely as the United States expressly retained jurisdiction over the territorial sea, by the same Act, property rights in the subsoil and seabed, including the natural resources therein, were quitclaimed to and vested and confirmed in the Gulf States to the extent of their boundaries as they existed at the time they became members of the Union.

And as to the meaning of the words "as they existed at the time" used in the Submerged Lands Act with reference to the Gulf States' boundaries at the time they were admitted into the Union, which was much belabored in the oral argument of the Solicitor General, suffice it to say that if the argument of the United States to the effect that a three mile national seaward boundary existed at the relevant times and that this foreclosed any State from claiming beyond the national boundary after admission into the Union, and that the said words meant "boundaries as they existed just after admission" should prevail, then the Congress did a vain and useless thing by including any reference to the boundaries of the Gulf States more than three miles seaward.

We submit that the rules of statutory construction decry such an interpretation of uselessness being read into a substantial portion of this Act of the Congress which was duly approved by the President. We contend that the Act of Admission of Mississippi, approved December 10, 1817, referred back to the Enabling Act of Congress of March 1, 1817, and the Mississippi Constitution adopted pursuant to said Enabling Act in August of the same year, and incorporated by reference thereto the Mississippi boundary description set out in said two earlier documents. Thus, rather than refuting its prior setting of the seaward boundary of Mississippi at three leagues in the Gulf, the Congress, by referring back to the Enabling Act and to the Mississippi Constitution in the Act of Admission, thereby reaffirmed that at the instant Mississippi was admitted into the Union and from that time on, unless duly and legally altered, its seaward boundary was fixed and

CONCLUSION

The State of Mississippi respectfully submits that the motion of the United States for judgment should be denied, and that judgment should be entered herein recognizing title in the State of Mississippi to the submerged lands and natural resources within three marine leagues from its coast line into the Gulf of Mexico, however, not to extend beyond its boundary which existed at the time it became a member of the Union and which was located six leagues from shore in the Gulf.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of Mississippi

JOHN H. PRICE, JR.
Assistant Attorney General

October, 1959.

PROOF OF SERVICE

I, Joe T. Patterson, Attorney General of the State of Mississippi, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____day of October, 1959, I served copies of the foregoing supplemental brief on the several parties to said cause as follows:

(1) On the United States, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington 25, D. C., and

(2) On the States of Texas, Louisiana, Alabama and Florida, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to their respective Attorneys General at their respective addresses as follows: Capitol Building, Austin, Texas; Capitol Building, Baton Rouge, Louisiana; State Office Building, Montgomery, Alabama; and Capitol Building, Tallahassee, Florida.

I also certify that on the_____day of October, 1959, I served typewritten copies of the foregoing supplemental brief on the Solicitor General of the United States, pursuant to the instructions of this Honorable Court, by mailing copies in a duly addressed envelope, with air mail postage prepaid, to him at the Department of Justice Building, Washington 25, D. C.

JOE T. PATTERSON
Attorney General of Mississippi

CONCLUSION

The State of Mississippi respectfully submits that the motion of the United States for judgment should be denied, and that judgment should be entered herein recognizing title in the State of Mississippi to the submerged lands and natural resources within three marine leagues from its coast line into the Gulf of Mexico, however, not to extend beyond its boundary which existed at the time it became a member of the Union and which was located six leagues from shore in the Gulf.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of Mississippi

JOHN H. PRICE, JR.
Assistant Attorney General

October, 1959.

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